17 15

Nos. 06-340 & 06-549

FILED
FEB 19 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

NATIONAL ASSOCIATION
OF HOME BUILDERS, *et al.*,

Petitioners,

v.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE STATES OF NEBRASKA, ALABAMA, ALASKA, COLORADO. IDAHO, MISSOURI, NEVADA, NEW MEXICO, NORTH DAKOTA, TENNESSEE, UTAH, AND WYOMING; AND THE COMMONWEALTH OF PUERTO RICO IN SUPPORT OF PETITIONERS

JON C. BRUNING
Nebraska Attorney General
DAVID D. COOKSON*
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509
(402) 471-2682
*Counsel of Record for
Amici States

DONALD G. BLANKENAU
THOMAS R. WILMOTH
Special Assistant
Attorneys General
BLACKWELL SANDERS PEPER
MARTIN LLP
206 South 13th Street
Suite 1400
Lincoln, NE 68508
(402) 458-1500

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964

TROY KING
Alabama Attorney General
Office of the Attorney General
11 South Union Street
Montgomery, AL 36130
(334) 353-3915

TALIS J. COLBERG
Alaska Attorney General
P.O. Box 110300
Juneau, AK 99811
(907) 465-2133

JOHN W. SUTHERS
Colorado Attorney General
1525 Sherman St., 7th Floor
Denver, CO 80203
(303) 866-4500

LAWRENCE WASDIN
Idaho Attorney General
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-4118

JAY NIXON
Missouri Attorney General
207 W. High St.
P.O. Box 899
Jefferson City, MO 65102
(573) 751-0774

CATHERINE CORTEZ MASTO
Nevada Attorney General
OFFICE OF THE ATTORNEY GENERAL
100 North Carson St.
Carson City, NV 89701
(775) 684-1112

GARY K. KING
New Mexico Attorney General
STEPHEN R. FARRIS
FRANCES C. BASSETT
Assistant Attorneys General
P.O. Drawer 1508
Santa Fe, NM 87504
(505) 827-6939

WAYNE STENEHJEM
Attorney General of North Dakota
State Capitol
600 E. Boulevard Ave.
Bismarck, ND 58501
(701) 328-2210

ROBERT E. COOPER, JR.
Tennessee Attorney General
P.O. Box 20207
Nashville, TN 37202
(615) 532-2582

MARK L. SHURTLEFF
Utah Attorney General
Utah State Capitol Complex
East Office Bldg., Suite 320
Salt Lake City, UT 84114
(801) 538-9600

PATRICK J. CRANK
Wyoming Attorney General
123 State Capitol
Cheyenne, WY 82002
(307) 777-7841

ROBERTO J. SANCHEZ-RAMOS
Secretary of Justice
COMMONWEALTH OF PUERTO RICO
P.O. Box 9020192
San Juan, PR 00902
(787) 763-1985

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* STATES 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

I. ENGAGING IN ESA § 7(a)(2) CONSULTATION, EVEN IF UNNECESSARY, DID NOT RENDER ARBITRARY EPA'S POSITION CONCERNING ITS LACK OF DISCRETION TO SUPPLEMENT CWA § 402(b)'S CRITERIA, AND REMAND WOULD SERVE NO PURPOSE SINCE THE AGENCIES RESOLVED THE DISPOSITIVE LEGAL ISSUE 5

II. ESA § 7(a)(2) DOES NOT REQUIRE CONSULTATION ON THE TRANSFER OF NPDES PERMITTING AUTHORITY TO THE STATES OR VEST EPA WITH POWER TO CONDITION TRANSFER ON TERMS OTHER THAN THOSE IN CWA § 402(b) 11

A. CWA § 402(b) Requires Transfer upon Satisfaction of Its Exclusive Criteria 11

B. The ESA Does Not Impliedly Repeal or Amend CWA § 402(b) 15

1. Ordinary implied repeal standards are not satisfied here 16

2. Nothing in the language or history behind ESA § 7(a)(2) supports the panel majority's conclusion that the law expands existing agency authority 18

TABLE OF CONTENTS – Continued

Page

3. The Service, charged with administering ESA § 7(a)(2), has concluded the statute does not expand existing agency authority..... 22

C. Crediting the majority's construction would have dramatic consequences on the States – even those with approved NPDES programs..... 26

CONCLUSION..... 29

TABLE OF AUTHORITIES

Page

CASES

Am. Forest & Paper Ass'n v. EPA, 137 F.3d 291 (5th Cir. 1998) 15, 24, 26

Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U.S. 315, 59 S.Ct. 196 (1938) 17

California v. United States, 438 U.S. 645, 98 S.Ct. 2985 (1978) 27

Chemehuevi Tribe of Indians v. F.P.C., 420 U.S. 395, 95 S.Ct. 1066 (1975) 24

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778 (1984) 5, 22, 23

Citizens for a Better Env't v. EPA, 596 F.2d 720 (7th Cir. 1979) 15

Cohen v. Virginia, 19 U.S. (6 Wheat.) 264, 5 L.Ed. 281 (1821) 17

Defenders of Wildlife v. E.P.A., 450 F.3d 394 (9th Cir. 2006) ..... *passim*

Defenders of Wildlife v. E.P.A., 420 F.3d 946 (9th Cir. 2005) ..... *passim*

EPA v. California, 426 U.S. 200, 96 S.Ct. 2022 (1976) 15

Forest Guardians v. Johanns, 450 F.3d 455 (9th Cir. 2006) 27

Gonzales v. Thomas, ___ U.S. ___, 126 S.Ct. 1613 (2006) (*per curiam*) 9

Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 102 S.Ct. 3245 (1982) 14

TABLE OF AUTHORITIES – Continued

Page

In re Operation of the Missouri River System Litigation, 421 F.3d 618 (8th Cir. 2005).....24, 25

INS v. Ventura, 537 U.S. 12, 123 S.Ct. 353 (2002) (*per curiam*)..... 9, 10

King v. St. Vincent Hospital, 502 U.S. 215, 112 S.Ct. 570 (1991)..... 22

Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 111 S.Ct. 1171 (1991) 23

Morton v. Mancari, 417 U.S. 535, 945 S.Ct. 2474 (1974).....16, 17

Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 103 S.Ct. 2856 (1983)..... 8

N. Alaska Env'l Ctr. v. Kempthorne, 457 F.3d 969 (9th Cir. 2006) 27

N.L.R.B. v. Bell Aerospace Co. Division of Textron Inc., 416 U.S. 267, 94 S.Ct. 47 (1974).....24, 26

National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967, 125 S.Ct. 2688 (2005)..... 23

Nat'l Wildlife Fed'n v. Burlington N.R.R., 23 F.3d 1508 (9th Cir. 1994)..... 18

Natural Res. Def. Council, Inc. v. EPA, 859 F.2d 156 (D.C. Cir. 1988)..... 15

Pittsburgh & Lake Erie R. Co. v. Railway Labor Executives' Ass'n, 491 U.S. 490, 109 S.Ct. 2584 (1989).....16, 17

Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC, 962 F.2d 27 (D.C. Cir. 1992).....18, 24

TABLE OF AUTHORITIES – Continued

Page

Radzanower v. Touche Ross & Co., 426 U.S. 148, 96 S.Ct. 1989 (1976) 17

Rio Grande Silvery Minnow v. Keys, 333 F.3d 1109 (2003), *vacated as moot*, 355 F.3d 1215 (10th Cir. 2004) 27

Riverside Irr. Dist. v. Andrews, 758 F.2d 508 (10th Cir. 1985) 24

Save the Bay, Inc. v. Adm'r, EPA, 556 F.2d 1282 (5th Cir. 1977) 15

SEC v. Chenery Corp., 318 U.S. 80, 63 S.Ct. 454 (1943) 9

Sierra Club v. Marsh, 816 F.2d 1376 (9th Cir. 1987) 28

Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 121 S.Ct. 675 (2001) 28

Traynor v. Turnage, 485 U.S. 535, 108 S.Ct. 1372 (1988) 16

TVA v. Hill, 437 U.S. 153, 98 S.Ct. 2279 (1978) 16, 18, 20

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS, AND RULES

Administrative Procedure Act
5 U.S.C. § 706(2)(a) 8

Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136(w)(1)(a) 2

Endangered Species Act,
16 U.S.C. §§ 1531-1544 (1973) 1

16 U.S.C. § 1531(c)(1) 22

TABLE OF AUTHORITIES – Continued

Page

16 U.S.C. § 1534 22

16 U.S.C. § 1536(a)(1) 18

16 U.S.C. § 1536(a)(2) ..... *passim*

16 U.S.C. § 1538 22

Endangered Species Act of 1973,
Pub. L. No. 93-205, § 7, 87 Stat. 884 (1973) 19

Clean Water Act,
33 U.S.C. §§ 1251-1387 (1972) 1

33 U.S.C. § 1251(b) 11, 12

33 U.S.C. § 1251(g) 12

33 U.S.C. § 1288 12

33 U.S.C. § 1341 14

33 U.S.C. § 1342 1

33 U.S.C. § 1342(b) ..... *passim*

33 U.S.C. § 1342(c) 14

33 U.S.C. § 1344(g)-(j) 12

33 U.S.C. § 1370 12

Safe Drinking Water Act,
42 U.S.C. § 300(g)(2)(a) 2

Resource Conservation and Recovery Act,
42 U.S.C. § 6947(a) 2

Clean Air Act,
42 U.S.C. § 7410(k)(3) 2

Water Pollution Control Act of 1948,
Ch. 758, § 1, 62 Stat. 1155 (1948) 11

Water Pollution Control Act Amendments of 1956,
Ch. 518, § 1, 70 Stat. 498 (1956) 11

TABLE OF AUTHORITIES – Continued

Page

Water Quality Act of 1965, Pub. L. No. 89-234, § 5, 79 Stat. 903, 907-08 (1965) 12

Clean Water Restoration Act of 1966, Pub. L. 89-753, §§ 101, 201, 80 Stat. 1246 (1966) 12

Reclamation Act, ch. 1093, § 8, 30 Stat. 388 (1902) 27

40 C.F.R. § 123.1(c) 14

40 C.F.R. § 123.61(b) 14

50 C.F.R. § 402.02 ..... 6, 23

50 C.F.R. § 402.03 ..... *passim*

50 C.F.R. § 402.14(g)(8) 23

50 C.F.R. § 402.16 ..... 5, 27

MISCELLANEOUS

117 Cong. Rec. 38845 (1971) 12

118 Cong. Rec. 10201 (1972) 13

118 Cong. Rec. 33747 (1972) 12

118 Cong. Rec. 33761 (1972) 13

H.R. REP. NO. 92-911 (1972) 14

H.R. REP. NO. 92-1465 (1972) (Conf. Rep.) 13

H.R. REP. NO. 93-412 (1973) 20

H.R. REP. NO. 95-1625 (1978) *reprinted in* 1978 U.S.C.C.A.N. 9453 21

H.R. REP. NO. 95-1804 (1978) (Conf. Rep.) *reprinted in* 1978 U.S.C.C.A.N. 9484 21

TABLE OF AUTHORITIES – Continued

Page

H.R. REP. NO. 96-167 (1979) *reprinted in* 1979 U.S.C.C.A.N. 2557 21

H.R. REP. NO. 97-567 (1982) *reprinted in* 1982 U.S.C.C.A.N. 2807 22

S. REP. NO. 92-414 (1971) 12, 14

S. REP. NO. 96-151 (1979) 21

Interagency Cooperation – Endangered Species Act of 1973, as Amended; Final Rule, 51 Fed. Reg. 19,926 (June 3, 1986) 24

Congressional Research Service, LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973 AS AMENDED IN 1976, 1977, 1978, 1979 AND 1980 19

James C. Kilbourne, THE ENDANGERED SPECIES ACT UNDER A MICROSCOPE: A CLOSEUP LOOK FROM A LITIGATOR'S PERSPECTIVE, 21 Envt'l L. 499 (1991) 25

U.S. Environmental Protection Agency, National Pollutant Discharge Elimination System, State Program Status, (April 14, 2003) http://cfpub.epa.gov/npdes/statestats.cfm 1

BRIEF *AMICUS CURIAE*

The *Amici Curiae* States of Nebraska *et al.* (the "*Amici* States"), through their respective Attorneys General, respectfully submit this brief pursuant to Sup. Ct. R. 37.4 in support of the petitioners.

INTEREST OF *AMICI CURIAE* STATES

The Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387 (1972), represents a highly successful example of cooperative federalism in environmental protection. A core, indeed animating, element of the CWA's regulatory scheme is the National Pollutant Discharge Elimination System ("NPDES") which controls point source discharges of pollutants into navigable waters of the United States. Under CWA § 402, 33 U.S.C. § 1342, the NPDES program is administered by the Environmental Protection Agency ("EPA"), but the statute mandates that EPA approve a State's application to assume responsibility of the NPDES program if nine exclusive criteria are satisfied. *Id.* at (b)(1)-(9). Over the almost 35 years since the CWA's passage, all but five States have assumed that responsibility. U.S. Environmental Protection Agency, National Pollutant Discharge Elimination System, State Program Status, (April 14, 2003) http://cfpub.epa.gov/npdes/statestats.cfm. The principal question presented here is whether the Endangered Species Act ("ESA") 16 U.S.C. §§ 1531-1544 (1973), impliedly amended or otherwise superseded the CWA by imposing a tenth condition precedent – compliance with the substantive requirements in ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2) – to EPA's transfer of NPDES permitting authority to an applicant State.

The answer to that question is important to the *Amici* States for two fundamental reasons. *First*, they have a strong interest in securing and maintaining responsibility for the NPDES program on the terms Congress prescribed in the CWA. That 90 percent of the States have undertaken the statutory, administrative and fiscal burdens necessary to satisfy CWA § 402(b)'s requirements and implement the program reflects the States' strong commitment to protecting their individual interests, and the Nation's interest, in our rivers, streams and lakes. The majority panel's conclusion that EPA may withhold NPDES permitting authority from an otherwise qualified applicant based solely on the outcome of ESA § 7(a)(2) consultation threatens to preclude future transfers and undo prior transfers properly made pursuant to CWA § 402(b). *Second*, as explained in the *Amici* States' brief in support of EPA's petition for certiorari, the CWA is one of several federal environmental statutes that embody a comparable structure of cooperative federalism. *See, e.g.*, Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136(w)(1)(a); Safe Drinking Water Act, 42 U.S.C. § 300(g)(2)(a); Resource Conservation and Recovery Act, 42 U.S.C. § 6947(a); Clean Air Act, 42 U.S.C. § 7410(k)(3). The majority's reasoning leads inexorably to the conclusion that ESA § 7(a)(2) impliedly amended or otherwise superseded those laws.

SUMMARY OF THE ARGUMENT

I. The biological opinion issued by the U.S. Fish and Wildlife Service ("Service" or "FWS") and adopted by EPA when approving Arizona's NPDES transfer application did not employ "inconsistent" reasoning. As the panel majority

itself recognized, a key rationale for the no-jeopardy finding was the agencies' conclusion that, *inter alia*, loss of possible benefits from ESA consultation upon transfer was not an "effect of the action" because that loss derived from the mandatory nature of the transfer obligation under CWA § 402(b). Although that legal conclusion could have also provided grounds for avoiding ESA § 7(a)(2) consultation in the first instance, the administrative record establishes that the agencies assumed a duty to consult and focused their legal analysis (and interagency debate) on whether EPA possessed any discretion to deny the Arizona application once CWA § 402(b)'s transfer criteria were satisfied. The agencies cannot be faulted for failing to consider whether consultation was required, when that became at most an academic concern upon issuance of a "no-jeopardy" biological opinion. The critical issue here is instead whether the basis, as articulated in the biological opinion, for its findings comports with the involved statutes.

Even were the "inconsistency" posited by the panel majority present, remand for purposes of resolving it is unnecessary. The majority devoted most of its opinion to rejecting the agencies' legal conclusion that EPA lacked authority to deny the transfer application once it found the CWA § 402(b) criteria met. Its analysis subsumed any question to which remand might be directed. This matter thus differs markedly from cases where a reviewing court improperly supplemented the record by deciding for the first time an issue never addressed by the agency below. The Service and EPA resolved in the negative the question whether the ESA expanded the latter's authority when making NPDES transfer determinations.

II. The majority panel's opinion "transformed the ESA into an overriding mandate that trumps an agency's obligations under its own governing statute." *Defenders of Wildlife v. E.P.A.*, 450 F.3d 394, 398 (9th Cir. 2006) (Kozinski, J., dissenting) ("*Defenders II*"). The majority failed to respect Congress' clear intent that the States occupy the primary role of regulating water pollution and that the States' administration of the NPDES program supplant that of EPA when nine *exclusive* criteria set forth in CWA § 402(b) are satisfied. That statute's text, whether viewed in isolation or in context with the more general congressional development of federal water quality policy and CWA legislative history, "leaves no room for conditions ten, eleven, or whatever else [courts] may think Congress should have added." *Defenders II*, 450 F.3d at 402 (Kleinfeld, J., dissenting).

The central question here is whether the ESA impliedly altered CWA § 402(b). Under settled principles of statutory construction, it did not. Repeals by implication are strongly disfavored and can be found only through a clear and manifest expression of congressional intent. Nothing remotely suggesting such intent can be discerned from the ESA's original or current text. In particular, the panel majority's reliance on a 1978 amendment dividing subsection (a) of ESA § 7 into separate paragraphs was unfounded. Neither the amendment's text nor history provides grounds to view Congress' action as expanding the substantive reach of the original provision and granting federal agencies unqualified power to protect listed species in deragation of a competing congressional mandate. Even were there ambiguity on this point, the Service's construction of ESA § 7(a)(2)'s applicability in 50 C.F.R. § 402.03 would control under *Chevron* deference

standards. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778 (1984).

The court of appeals' understanding of ESA § 7(a)(2), if accepted, will have dramatic consequences for the State of Alaska, which is currently seeking NPDES program authority,[1] and for states like Idaho, which have not yet sought such authority. For these States, CWA § 402(b) would no longer set an exclusive standard for NPDES program approval. For the *forty-five* other States that already possess NPDES authority, the specter of consultation reinitiation under 50 C.F.R. § 402.16 would arise. In either instance, the long-standing and carefully-wrought statutory scheme embodied in the CWA would be materially disrupted and otherwise compliant state regulatory processes (and related investment) would be placed at risk.

ARGUMENT

I. ENGAGING IN ESA § 7(a)(2) CONSULTATION, EVEN IF UNNECESSARY, DID NOT RENDER ARBITRARY EPA'S POSITION CONCERNING ITS LACK OF DISCRETION TO SUPPLEMENT CWA § 402(b)'s CRITERIA, AND REMAND WOULD SERVE NO PURPOSE SINCE THE AGENCIES RESOLVED THE DISPOSITIVE LEGAL ISSUE.

In its Order granting the petitions, this Court requested the parties brief the following question:

[1] *See generally* Brief of *Amicus Curiae* State of Alaska in Support of Petitions for Writ of Certiorari.

> Whether the court of appeals correctly held that [EPA's] decision to transfer pollution permitting authority to Arizona under the Clean Water Act, *see* 33 U.S.C. § 1342(b), was arbitrary and capricious because it was based on inconsistent interpretations of Section 7(a)(2) of the Endangered Species Act of 1973, 16 U.S.C. § 1536(a)(2); and, if so, whether the court of appeals should have remanded to [EPA] for further proceedings without ruling on the interpretation of Section 7(a)(2).

The *Amici* States submit that the panel majority erred in holding that perceived "inconsistencies" rendered EPA's decision arbitrary and capricious, but that, in any event, remand was not required and would have been fruitless.

The majority below correctly recognized that the biological opinion forming the basis of the challenge by petitioners below set out several reasons why EPA's CWA § 402(b) transfer determination did not carry any impacts properly characterized as "effects of the action" defined in 50 C.F.R. § 402.02. *Defenders of Wildlife v. E.P.A.*, 420 F.3d 946, 960-61 (9th Cir. 2005) ("*Defenders I*"). Principal among those reasons was the legal conclusion that "EPA ha[d] no authority to disapprove transfer applications because of an impact on listed species, section 7(a)(2) of the Endangered Species Act notwithstanding." *Id.* at 961. The majority devoted much of the remaining portion of the decision below to rejecting this conclusion on its merits. *Id.* at 962-71.

The panel majority, however, prefaced its discussion of ESA § 7(a)(2)'s scope with the holding that EPA's transfer determination was predicated on the mutually exclusive "propositions" that, while obligated to consult under

the ESA over the determination, the agency was "not permitted, as a matter of law, to take into account the impact on listed species in making the transfer decision." *Defenders I*, 420 F.3d at 961. It drew this inconsistency from its view that ESA § 7(a)(2)'s procedural and substantive duties are coterminous and that, as a consequence, once a particular agency activity is deemed an "action" for consultation purposes, any impacts from it must be deemed "effects of the action." *Id.*

The inconsistency perceived by the majority did not constitute a basis for invalidating the transfer determination. That, in retrospect, EPA could have refused to consult with the Service at all – since the transfer did not embody the exercise of agency discretion once Arizona satisfied the CWA § 402(b) criteria – made no difference to the ultimate result: the issuance of a biological opinion containing a no-jeopardy finding. The majority simply introduced an "inconsistency" of its "own making" into the case – as Judge Kozinski observed in his dissent from denial of the request for rehearing *en banc*. *Defenders II*, 450 F.3d at 396. The acuity of Judge Kozinksi's observation can be seen in the internal debate at lower EPA and Service echelons recorded in the "elevation" memorandum. NAHB Pet. App. at 562-82. Their debate centered on the problem of whether the EPA had ESA-based authority to condition approval of Arizona's program on terms accommodating the Service's concern over a loss of the "federal nexus" needed to trigger the ESA § 7 consultation process. NAHB Pet. App. at 563-64. The Service eventually acceded in the biological opinion to EPA's position – an accession that rendered academic the arguably antecedent question

whether consultation had been required in the first instance.[2]

The two agencies thus can hardly be faulted for not considering a particular issue of statutory construction whose resolution made no difference to them under the circumstances. Although this decision-making approach failed to answer a question that the majority deemed essential, the deferential review standard under 5 U.S.C. § 706(2)(a) empowers the courts only to measure the reasonableness of the agencies' action against the reason given and not to superimpose its decision-making preferences. *Motor Vehicle Mfrs. Ass'n of United States, Inc. v.*

---

[2] The immateriality of the "inconsistency" perceived by the panel majority is underscored by a more detailed review of the interagency debate. First, formal consultation had been commenced in accordance with then-existing practice. *Defenders I*, 420 F.3d at 952 n.3. It was thus unsurprising that the agencies began the § 7(a)(2) process without independently analyzing its necessity. Second, the Service contended in the interagency elevation document that "EPA Region 9 retains Federal oversight for the [state NPDES] program and thus there is a lingering Federal nexus from which EPA Region 9 can address effects to the listed species." NAHB Pet. App. at 567. The corollary to this contention was the existence of agency action for ESA § 7(a)(2) purposes. *See Defenders I*, 420 F.3d at 962 (discussing the need for "nexus" between the agency action and impact on listed species). EPA disagreed with the Service's position concerning the presence of continuing oversight authority (NAHB Pet. App. at 564), and the agencies' differences were resolved in the EPA's favor only in the biological opinion itself. It made no sense to conclude that the biological opinion – and hence EPA's reliance on it – was somehow deficient in not disposing of an issue only of theoretical significance given the fact that consultation *had* taken place and produced a no-jeopardy opinion. The court of appeals therefore would have been confronted with the same substantive question even had the agencies found the transfer determination outside the reach of ESA § 7(a)(2): whether any impacts associated with that determination – most particularly loss of ESA consultation – were the result of congressionally mandated, and not agency, action.

State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 2867 (1983). Any other conclusion effectively allows the reviewing court to substitute its judgment of the proper decision-making template for that of the agency – a result which runs counter to the settled principle that a "judicial judgment cannot be made to do service for an administrative judgment," *SEC v. Chenery Corp.*, 318 U.S. 80, 88, 63 S.Ct. 454, 459 (1943), and in which the Ninth Circuit recently was counseled. *See Gonzales v. Thomas*, ___ U.S. ___, 126 S.Ct. 1613, 1615 (2006) (*per curiam*); *INS v. Ventura*, 537 U.S. 12, 123 S.Ct. 353 (2002) (*per curiam*).

Finally, even had the majority below been correct on the "inconsistency" issue, remand for clarification would be inappropriate in light of the ensuing analysis in Part III.C of the decision. The majority rejected there the position advanced by EPA in the elevation document – and ultimately adopted in the biological opinion – that EPA lacked power to impose ESA-related conditions as part of the Arizona program approval and, in so rejecting, resolved the "action" issue. *See, e.g., Defenders I,* 420 F.3d at 967 (construing ESA § 7(a)(2) as independently conferring agency power "to protect listed species when the agency engages in an affirmative action that is both within its decisionmaking authority and unconstrained by earlier agency commitments"). Because the court directed the discussion in Part III.C to one of the substantive predicates for the biological opinion's determination, it articulated a ground for granting the petition for review *independent* of the "inconsistency" ruling. The court's holding in Part III.C thereby resolved the question nominally left open for remand in Part III.B.

In sum, there is no basis for remand to EPA. The agencies' staff-level deliberations did not affect the ultimate outcome of the administrative process. Neither EPA, nor the Service for that matter, acted inconsistently with respect to the *final action* on review, which, as Judge Kozinski later pointed out, was the only reviewable action. *Defenders II,* 450 F.3d at 396. Whether or not consultation was initially required, "[w]hen deciding whether to transfer permitting authority, the [Service] issued, and the EPA relied on, a Biological Opinion premised on the proposition that the EPA lacked authority to take into account the impact of that decision on endangered species and their habitats." *Defenders I*, 420 F.3d at 950. This case, therefore, is not like *Thomas* or *Ventura*, where the court of appeals improperly augmented the administrative proceedings by deciding a factual issue not previously considered by the agency. *Thomas*, 126 S.Ct. at 1614 (whether family members constituted "a particular social group" within the scope of 8 U.S.C. § 1101(a)(42)(A)); *Ventura*, 537 U.S. at 13-14, 123 S.Ct. at 354 (whether changed circumstances disqualified individual seeking political asylum regardless of his past persecution). Rather, because the agencies had, in fact, consulted, produced a biological opinion and adhered to its contents, the court of appeals was required to review that process. *See Defenders II,* 450 F.3d at 394, n.1 (Berzon, J., concurring). The issues presented – whether EPA had to consult in the first instance, or whether EPA had authority to condition its decision for the benefit of threatened and endangered species – were then, and continue to be, questions of federal law and should be resolved now by this Court. Remand for clarification of the consulting agencies' views on the law would be useless, since the Service and EPA have answered the

dispositive question already by authoring and adopting the biological opinion itself.[3]

II. ESA § 7(a)(2) DOES NOT REQUIRE CONSULTATION ON THE TRANSFER OF NPDES PERMITTING AUTHORITY TO THE STATES OR VEST EPA WITH POWER TO CONDITION TRANSFER ON TERMS OTHER THAN THOSE IN CWA § 402(b).

A. CWA § 402(b) Requires Transfer upon Satisfaction of Its Exclusive Criteria.

The CWA could not be plainer about the centrality of the States' role in its administration. "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b). "It is the policy of Congress that the States . . . implement the permit programs under Sections 1342 [NPDES] and 1344 of this title." *Id.* As explained in the *Amici* States' brief supporting EPA's petition for certiorari, moreover, the evolution of federal clean water regulation illustrates Congress' intent to respect and promote the role of the States to prevent water pollution. Water Pollution Control Act of 1948, Ch. 758, § 1, 62 Stat. 1155 (1948); Water Pollution Control Act Amendments of 1956, ch. 518, § 1, 70 Stat. 498 (1956);

---

[3] The panel majority's comment that "the Biological Opinion's flaws are *legal* in nature" and that "[d]iscerning them requires no technical or scientific expertise" is telling in this regard. *Defenders I*, 420 F.3d at 976. What exists here is simply a difference of opinion between the agencies and the court of appeals over how to construe two statutes – a disagreement predicated on both decisionmakers actually having addressed the same "legal" issue.

Water Quality Act of 1965, Pub. L. No. 89-234, § 5, 79 Stat. 903, 907-08 (1965); Clean Water Restoration Act of 1966, Pub. L. 89-753, §§ 101, 201, 80 Stat. 1246, 1247 (1966); S. REP. NO. 92-414, at 1 (1971) ("For more than two decades, Federal legislation in the field of water pollution control has been keyed primarily to an important principle of public policy: The States shall lead the national effort to prevent, control and abate water pollution."). The 1972 amendments continued this policy. *See,* 33 U.S.C. § 1251(b); 33 U.S.C. § 1251(g) (States' authority to allocate water supply not abrogated by the CWA); 33 U.S.C. § 1288 (States' authority and role in waste treatment management); 33 U.S.C. § 1344(g)-(j) (States' authority to administer their own programs for discharge of dredged and fill material); 33 U.S.C. § 1370 (States' authority to control pollution, unless a State's standard is less stringent than that in the CWA).

The clearest proclamation of the congressional preference for state control is found in CWA § 402 which creates the NPDES Program. Under CWA § 402(b), EPA has this responsibility only until it is assumed by a State, and only thereafter if the State fails to fulfill it. Senator Edmund Muskie, the Senate floor leader for the 1972 amendments, recognized this fundamental policy during congressional debate:

> What [the CWA] does is continue the Federal Government's authority with respect to major polluters . . . until such time as the States can develop permanent authority of their own. *At that time it is the expectation of this bill and of this administration to have the States assume that permanent authority and to administer the law directly.*

117 Cong. Rec. 38845 (1971) (emphasis supplied); *see also* 118 Cong. Rec. 33747, 33750 (1972) (statement of Rep.

Jones) (" . . . it is intended that the State shall have primary responsibility for determining whether a discharge complies with the [CWA § 402] guidelines").

The respective versions of the 1972 amendments in the Senate and House differed significantly on this issue prior to resolution by the joint committee. The Senate bill, S. 2770, provided that "[u]nder section 402, the Administrator *can* delegate permit authority to a State if the State program is adequate." H.R. REP. NO. 92-1465, at 138 (1972) (Conf. Rep.) (emphasis supplied). The House amendment provided for "a State to administer its own permit program in lieu of the Administrator's program, and *the Administrator is required to approve a submitted State program* unless he finds that there is not adequate authority to issue the permits in accordance with the requirements of [the CWA]." *Id.* at 139 (emphasis supplied). In resolving this conflict, the conference adopted the House amendment, providing that the Administrator "shall approve" the State program if he finds adequate authority exists to administer the NPDES program. *Id.*; 33 U.S.C. § 1342(b).

Congress further recognized that once NPDES authority was transferred to a state, a permit issued by the State would be a state, not a federal, permit. *See, e.g.,* 118 Cong. Rec. 33761 (1972) (statement of Rep. Wright) ("These would be State, not Federal, actions, and thus . . . such permits would not require environmental impact statements."); 118 Cong. Rec. 10201, 10207 (1972) (statement of Rep. Jones) (describing the goal of § 402 as "State

administration of State programs").[4] Similarly, EPA must suspend the issuance of federal permits not later than 90 days after the date on which the State has submitted a program. 33 U.S.C. § 1342(c). *See also* S. REP. NO. 92-414, at 71 ("after a State submits a program which meets the criteria established by the Administrator pursuant to regulations, the Administrator shall suspend his activity in such State under the Federal permit program."). All permits issued thereafter are state permits pursuant to the State program.

CWA § 402(b) provides EPA "*shall* approve each . . . submitted program unless" the agency "determines that adequate authority does not exist" to administer the program in compliance with nine specific criteria. 33 U.S.C. § 1342(b)(1)-(9) (emphasis supplied). *See also* 40 C.F.R. §§ 123.1(c), 123.61(b). The plain language of CWA § 402(b) is clear. Congress intended the States would be entitled to administer the NPDES Program, provided the State could meet these stated requirements. As is often the case, the foregoing review of the CWA's legislative history "merely confirms that Congress intended the statute to mean exactly what its plain language says." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 574, 102 S.Ct. 3245, 3251-252 (1982). Numerous courts, accordingly, have

---

[4] Congress also recognized CWA § 401, 33 U.S.C. § 1341 does not apply to permits issued by a State under CWA § 402(b) because "permits granted by States under section 402 *are not Federal permits – but State permits.*" H.R. REP. NO. 92-911, at 127 (1972) (emphasis supplied). Congress thus included a provision in CWA § 402(b) that requires any permit program administered by a State to insure that any other State whose waters may be affected by the issuance of a permit have an opportunity to submit written recommendations with respect to the permit application. *Id.*

found EPA lacks discretion to deny approval if a state's program meets the nine exclusive criteria. *See EPA v. California*, 426 U.S. 200, 208, 96 S.Ct. 2022, 2026 (1976); *Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 297 (5th Cir. 1998); *Save the Bay, Inc. v. Adm'r, EPA*, 556 F.2d 1282, 1285 (5th Cir. 1977); *Natural Res. Def. Council, Inc. v. EPA*, 859 F.2d 156, 173-74 (D.C. Cir. 1988); *Citizens for a Better Env't v. EPA*, 596 F.2d 720, 722 (7th Cir. 1979). Because Arizona's application met all nine requirements of CWA § 402(b), EPA was obligated to transfer NPDES permitting authority to the State.

As discussed next, the consultation process conducted by EPA and the Service was unnecessary from the outset. Nevertheless, once conducted, the agencies properly concluded that EPA could not impose additional conditions precedent to the CWA § 402(b) transfer for the benefit of species. Thus, the biological opinion, while superfluous, reached the correct result with regard to the "effects of the action" component of the jeopardy analysis.

B. The ESA Does Not Impliedly Repeal or Amend CWA § 402(b).

The plain language and legislative history of CWA § 402(b) demonstrate EPA's categorical mandate to transfer permitting authority to a State when the latter's proposal meets the nine statutory criteria. The fundamental question in this case is whether EPA's obligations to transfer were superseded or amended when Congress enacted ESA § 7(a)(2). The panel majority's implicit conclusion in the affirmative is contrary to this Court's holdings concerning the implied repeal or amendment of statutes, as well as the plain language and legislative

history of the ESA itself. Moreover, it ignores the Service's properly promulgated regulatory interpretation of the statute.

1. Ordinary implied repeal standards are not satisfied here.

An implied amendment or repeal is an act which purports to be independent, but which alters, modifies, or adds to a prior act. The "cardinal rule" in this arena of statutory construction is "that repeals by implication are not favored." *Morton v. Mancari*, 417 U.S. 535, 549-550, 945 S.Ct. 2474, 2482 (1974). "[T]he intention of the legislature to repeal must be clear and manifest." *TVA v. Hill*, 437 U.S. 153, 189, 98 S.Ct. 2279, 2299 (1978). Another "basic principle of statutory construction [is] that a statute dealing with a narrow, precise, and specific subject is not subsumed by a later enacted statute covering a more generalized spectrum ... unless the later statute expressly contradicts the original act or unless such a construction is *absolutely necessary* in order that the words of the later statute shall have any meaning at all." *Traynor v. Turnage*, 485 U.S. 535, 547-48, 108 S.Ct. 1372, 1381-382 (1988) (internal citations and quotations omitted; emphasis added). The cardinal rule controls here. There is no expression anywhere in the ESA of Congress' intent to repeal prior existing mandates, and it is not "absolutely necessary" to find an implied amendment because EPA's statutory obligation under CWA § 402(b) can be read *in pari materia* with ESA § 7(a)(2).

When possible, the courts must strive to reconcile apparently competing mandates. In *Pittsburgh & Lake Erie R. Co. v. Railway Labor Executives' Ass'n*, for example, this

Court reconciled apparently conflicting provisions of the Railway Labor Act and Interstate Commerce Act explaining that its effort:

> . . . responds to our obligation to avoid conflicts between two statutory regimes, namely, the RLA and ICA, that in some respects overlap. As the Court has said, we "are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). We should read federal statutes "to give effect to each if we can do so while preserving their sense and purpose." *Watt v. Alaska*, 451 U.S. 259, 267 (1981); *see also United States v. Fausto*, 484 U.S. 439, 453 (1988).

491 U.S. 490, 510, 109 S.Ct. 2584, 2596 (1989); *see also Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155, 96 S.Ct. 1989, 1993 (1976) ("[W]hen two statutes are capable of coexistence, it is the duty of the courts . . . to regard each as effective."); *see also Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 332-33, 59 S.Ct. 196, 200 (1938) ("Where, as here, the language is susceptible of a construction which preserves the usefulness of the section, the judicial duty rests upon this Court to give expression to the intendment of the law."); *cf. Cohen v. Virginia*, 19 U.S. (6 Wheat.) 264, 393, 5 L.Ed. 281, 288 (1821) (Court's duty is "to construe the Constitution as to give effect to both provisions, as far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each other. We must endeavor so to construe them as to preserve the true intent and meaning of the instrument."). As explained next, nothing in the

ESA or its legislative history suggests that the requirements of ESA § 7(a)(2) override CWA § 402(b).

2. Nothing in the language or history behind ESA § 7(a)(2) supports the panel majority's conclusion that the law expands existing agency authority.

To support its interpretation, the panel majority relied principally on ESA § 7(a)(2)'s "insure" language as discussed by this Court in *Hill. Defenders I,* 420 F.3d at 964-967. This Court there enjoined completion of Tellico Dam because the dam's operation would "either eradicate the known population of snail darters or destroy their critical habitat." *Hill,* 437 U.S. at 171, 98 S.Ct. at 2290. However, *Hill* "did not . . . consider whether Section 7 allows agencies to go beyond their statutory authority to carry out the purposes of the ESA." *See Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC,* 962 F.2d 27, 34 (D.C. Cir. 1992); *Accord Nat'l Wildlife Fed'n v. Burlington N.R.R.,* 23 F.3d 1508, 1512 (9th Cir. 1994). Therefore, *Hill,* on its face lends no support whatsoever to the conclusion that ESA § 7(a)(2) superimposes a tenth criterion on CWA § 402(b) or, to put the proposition negatively, independently empowers EPA to ignore the clear direction of CWA § 402(b).

The majority also relied on its perceived distinction between ESA §§ 7(a)(1), 16 U.S.C. § 1536(a)(1), and 7(a)(2). *Defenders I,* 420 F.3d at 965. ESA § 7(a)(1) directs agencies to "utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of species." Because ESA § 7(a)(1) refers to agencies' "authorities" while ESA § 7(a)(2) does not, the majority concluded, by negative inference, that Congress intended to

grant additional authority to federal agencies in ESA § 7(a)(2). *Id.* That inference is belied by the evolution of ESA § 7.

As the panel majority noted, ESA §§ 7(a)(1) and 7(a)(2) originated as a single provision. It read:

> The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, *utilize their authorities* in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act and by taking such action necessary *to insure that actions authorized funded or carried out by them do not jeopardize* the continued existence of such endangered species and threatened species *or result in the destruction or modification of habitat* of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.

Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (1973) (emphasis supplied).[5] Thus, in the

---

[5] In 1982, the Congressional Research Service ("CRS") prepared for the Senate Committee on Environment and Public Works a summary of the legislative history of the ESA "[i]n order to preserve the context in which the Act was developed, to aid interpretation of provisions finally adopted, and to assist the Congress in the reauthorization process." Congressional Research Service, A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973 AS AMENDED IN 1976, 1977, 1978, 1979 AND 1980 ("ESA Leg. Hist.") at v. This authority is relied on extensively in the majority opinion below. *See, e.g., Defenders I*, 420 F.3d at 965-66. In describing the original obligations of federal agencies like EPA under ESA § 7, the CRS explained:

> All other Federal departments and agencies are to consult with the Secretary of Commerce or the Secretary of the

(Continued on following page)

original version of § 7 (applied in *Hill*), the obligations of federal agencies to carry out conservation programs (now contained in § 7(a)(1)) and to avoid jeopardy (now contained in § 7(a)(2)) were *both* qualified by the phrase "utilize their authorities." *Id.*[6]

> Interior, as appropriate, and with the assistance of those Secretaries *to use their authorities* to carry out endangered and threatened species conservation programs, to see that actions authorized, funded or carried out by them do not have adverse effects on the survival of such species including destruction of habitat deemed critical to their survival as determined by the appropriate Secretary.

Id. at 6. (Emphasis supplied). This summary reflects the intent expressed clearly in the House Report accompanying HR 37:

> The basic purpose of the Act is clearly stated in the legislation; to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, protected, or restored. In furtherance of this purpose, the bill declares a policy that Federal agencies are to *use the authorities that are available to them* in carrying out the objectives of the bill.

Id. at 145 (H.R. REP. NO. 93-412 (1973)) (emphasis supplied).

[6] In support of its contrary view, the majority panel drew too much from Rep. Dingell's discussion on the House floor of the import of ESA § 7. *Defenders I*, 420 F.3d at 965 (quoting Rep. Dingell). The majority failed to apprehend that the entirety of Rep. Dingell's discussion at that point in the congressional record is prefaced with the following statement:

> Another important step which we have taken in this bill – and in this regard the two bills are virtually identical – is that we have substantially amplified the obligation of both [wildlife] agencies and other agencies of the Government as well, to take steps *within their power* to carry out the purposes of this act.

ESA Leg. Hist. at 481. That agencies "can" and "must", *Defenders I*, 420 F.3d at 965, exercise that power at appropriate times to comply with the law is hardly remarkable. There is no indication, however, that Rep. Dingell (or anyone else on the House floor) believed that Congress was vesting agencies with authority to disregard congressional directives by virtue of ESA § 7.

When Congress separated ESA § 7 into subsections in 1978, the drafters explained that this editorial revision did not modify existing law:

> The conferees adopted Senate language creating a new Section 7(a), *which essentially restates section 7 of existing law,* and outlines the responsibilities of the Secretary and other Federal agencies for protecting endangered species. . . . The conferees felt that the Senate provision by retaining existing law, was preferable.

H.R. REP. NO. 95-1804 at 18 (1978) (Conf. Rep.) *reprinted in* 1978 U.S.C.C.A.N. 9484, 9486 (emphasis supplied). Congress' intent to retain within ESA § 7(a)(2) the temperance expressed in the original version of ESA § 7 could not have been more explicit.

As the panel majority noted, Congress significantly amended the ESA in 1978, 1979 and 1982 after *Hill* was decided. Nowhere, however, did the amendments purport to convey new authority to action agencies like EPA. Even were there ambiguity on this score, the legislative history in connection with those amendments (including those enacting ESA §§ 7(g) and 7(h) relied on by the majority) does not suggest that ESA § 7(a)(2) confers additional authority on action agencies not possessed under their existing authorities. *See, e.g.,* H.R. REP. NO. 95-1625 (1978) *reprinted in* 1978 U.S.C.C.A.N. 9453, 9461-62 (discussing "Section 7 and the consultation process"); H.R. REP. NO. 95-1804 (1978) (Conf. Rep.), *reprinted in* 1978 U.S.C.C.A.N. 9484, 9485-86 (discussing "Interagency Cooperation"); S. REP. NO. 96-151 (1979); H.R. REP. NO. 96-167 (1979) *reprinted in* 1979 U.S.C.C.A.N. 2557, 2561-62 (discussing "Section 7 and the Consultation Process"); H.R.

REP. NO. 97-567 (1982) *reprinted in* 1982 U.S.C.C.A.N. 2807, 2824-29 (discussing "Interagency Cooperation and Committee Exemptions").

Finally, the panel majority failed to put ESA § 7(a)(2) in context with the remainder of the law. The ESA's other key substantive provision is prohibitory in nature, *see, e.g.*, ESA § 9 (Prohibited Acts), 16 U.S.C. § 1538, and Congress' overall policy directs federal agencies to "*utilize their authorities* in furtherance of the purposes of this chapter." ESA § 2(c)(1), 16 U.S.C. § 1531(c)(1) (emphasis supplied). When Congress wanted to confer authority not otherwise possessed, it did so expressly. *See* ESA § 5, 16 U.S.C. § 1534, (requiring and empowering the Secretary of Agriculture to implement conservation programs in the National Forest System). As this Court explained in *King v. St. Vincent Hospital*, 502 U.S. 215, 221, 112 S.Ct. 570, 579 (1991), "a statute is to be read as a whole" because, of course, "the meaning of statutory language, plain or not, depends on context." The context in which ESA § 7(a)(2) resides makes clear Congress' intent to respect limitations placed on agencies' discretion by other legislative commands.

3. The Service, charged with administering ESA § 7(a)(2), has concluded the statute does not expand existing agency authority.

In light of the foregoing, it is clear that ESA § 7(a)(2) does not expand agencies' existing authorities in the manner stated by the panel majority. Nevertheless, even had the majority made a plausible case for some ambiguity as to this issue, the court ignored its duty under *Chevron* to defer to the Service's reasonable interpretation of ESA

§ 7(a)(2)'s application as embodied in 50 C.F.R. § 402.03, which states unequivocally:

> Section 7 and the requirements of this Part apply to all actions in which there is discretionary Federal involvement or control.

Compare 50 C.F.R. §§ 402.02, 402.14(g)(8) (requiring reasonable and prudent alternatives "consistent with the scope of the Federal agency's legal authority and jurisdiction."); *id.* § 402.16 (requiring reinitiation of formal consultation "where discretionary Federal involvement or control over the action has been retained").

In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, this Court summarized the analysis the majority should have performed in light of 50 C.F.R. § 402.03:

> In *Chevron* this Court held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps, the Court explained, involves difficult policy choices that agencies are better equipped to make than courts. 467 U.S., at 865-866, 104 S.Ct. 2778. If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, *even if the agency's reading differs from what the court believes is the best statutory interpretation.* *Id.*, at 843-844, and n.11, 104 S.Ct. 2778.

545 U.S. 967, 125 S.Ct. 2688, 2699 (2005) (emphasis supplied). *See also Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 150, 111 S.Ct. 1171, 1175 (1991) (agency's regulatory interpretation entitled to

"substantial deference"). *Compare Defenders II*, 450 F.3d at 397 (Kozinski, J.) ("The majority forgets that FWS is the agency charged with administering the ESA, and that its interpretation of the ESA is thus entitled to *Chevron* deference.").

Even greater deference is due the Service's interpretation, considering it has been in effect for over 20 years and is consistent with multiple lower court interpretations. *See Interagency Cooperation – Endangered Species Act of 1973, as Amended; Final Rule*, 51 Fed. Reg. 19,926 (June 3, 1986) (promulgating 50 C.F.R. § 402.03); *In re Operation of the Missouri River System Litigation,* 421 F.3d 618, 630 (8th Cir. 2005); *American Forest,* 137 F.3d at 291; *Platte River,* 962 F.2d at 33; *Riverside Irr. Dist. v. Andrews*, 758 F.2d 508, 511 (10th Cir. 1985) ("The [ESA] does not, by its terms, enlarge the Corps' jurisdiction under the [CWA]."). In *N.L.R.B. v. Bell Aerospace Co. Division of Textron Inc.*, 416 U.S. 267, 274, 275, 94 S.Ct. 47, 1761-62 (1974), this Court explained under such circumstances, "a court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration." *See also Chemehuevi Tribe of Indians v. F.P.C.*, 420 U.S. 395, 408-410, 95 S.Ct. 1066, 1074-1075 (1975) (affording deference to "longstanding administrative construction" of the Federal Power Commission regarding its jurisdiction to license thermal power plants).

Instead, the panel majority refused even to acknowledge the import of the Service's regulation, which spoke directly to the issue before it. *See Defenders I,* 420 F.3d at 967 ("Section 7(a)(2) applies to all agency actions 'authorized, funded or carried out' by the agency in question. . . . *Our* determination as to whether the transfer decision is covered thus depends on the meaning of those terms.")

(Emphasis supplied); *see also id.* at 969 n.19 ("The dissent argues that we should nonetheless affirm the EPA's action based on § 402.03 because the question is one of statutory interpretation. But that is simply not so; § 402.03 is a regulation, not a statute."); *Defenders II,* 450 F.3d at 397-98 ("Having decided to conduct – on its own – the very analysis that FWS already conducted, the majority comes out the other way, getting it flatly wrong.") (Kozinski, J., dissenting). Unable to reconcile its *own* view of ESA § 7(a)(2) with the Service's, the majority marginalized the agency's regulatory interpretation as a mere "gloss" on the statute, *Defenders I,* 420 F.3d at 967, and "simply [found] that the word 'discretionary' in the regulation is meaningless." *Defenders II,* 450 F.3d at 398 (Kozinski, J., dissenting).

In this case, based on 50 C.F.R. § 402.03, EPA and, more importantly, the Service rightly "determined – after careful study at the local and national levels – that the ESA was inapplicable to EPA's decision, and it issued a BiOp relaying its conclusions to the EPA." *Defenders II,* 450 F.3d at 397 (Kozinski, J., dissenting); *see also id.* at 396 ("under FWS's interpretation, the ESA was inapplicable: EPA's decision to grant the transfer could not 'cause' any impact on endangered species because the decision was non-discretionary"). *Compare Missouri River,* 421 F.3d at 630 ("Case law supports the contention that environmental – and wildlife-protection statutes do not apply when they would render an agency unable to fulfill a non-discretionary statutory purpose or require it to exceed its statutory authority."). *See also* James C. Kilbourne, THE ENDANGERED SPECIES ACT UNDER A MICROSCOPE: A CLOSEUP LOOK FROM A LITIGATOR'S PERSPECTIVE, 21 Envt'l L. 499, 528 (1991) (Explaining that 50 C.F.R. § 402.03

represents an exception to the "sweeping definition of 'action,' which render[s] section 7's substantive and procedural obligations inapplicable."). While the panel majority might not have preferred the agency's conclusion, it could not "overturn FWS's statutory interpretation simply because it disagree[d] with it." *Id.* Rather, the majority was required to defer to the Service's reasonable interpretation of 50 C.F.R. § 402.03. Had it done so, the biological opinion would have been upheld, and the fabricated conflict between ESA § 7(a)(2) and CWA § 402(b) would have been eliminated.

In the end, the plain intent and legislative history of the statute, the Service's longstanding construction of its application, and the treatment by the courts of appeal all show that ESA § 7(a)(2) is not a "font of new authority." *American Forest*, 137 F.3d at 299. *Compare Bell Aerospace*, 416 U.S. at 289, 94 S.Ct. at 1769 ("In sum, the Board's early decisions, the purpose and legislative history of the Taft-Hartley Act of 1947, the Board's subsequent and consistent construction of the Act for more than two decades, and the decisions of the courts of appeals all point unmistakably to the conclusion that 'managerial employees' are not covered by the Act.").

C. Crediting the Majority's Construction Would Have Dramatic Consequences on the States – Even Those With Approved NPDES Programs.

Perhaps the greatest problem with the majority panel's interpretation is that it not only erects new hurdles for the five states that have not yet achieved NPDES

primacy,[7] but also casts doubt on the continuing vitality of NPDES programs currently administered by *forty-five States* that already possess such authority.[8]

Under the Service's consultation regulations, a federal agency like EPA is obligated to reinitiate ESA § 7(a)(2) consultation on prior actions under four separate circumstances. 50 C.F.R. § 402.16 (authorized "take" excedance (§ 402.16(a)); new information revealing new effects (§ 402.16(b)); modification of the action, which causes a new effect (§ 402.16(c)); or new protected species or habitat identified in the action area (§ 402.16(d)). *N. Alaska Env'l Ctr. v. Kempthorne*, 457 F.3d 969 (9th Cir. 2006); *Forest*

---

[7] The requirement of ESA consultation on a program approval could, in practice, prove difficult to implement, since neither state nor federal agencies can know at that stage what kinds of projects the approved state might ultimately permit. *See* Brief of *Amicus Curiae* State of Alaska in Support of Petitions for Writ of Certiorari at 3-5.

[8] While this case arises in the context of a single program under the CWA, the potential impact of the court of appeals' holding could implicate *all* federal programs. The court of appeals expanded significantly action agencies' ability to exceed limits otherwise constraining their authority and of wildlife agencies to formulate reasonable and prudent alternatives that, if implemented, could entail action contrary to action agencies' other statutory duties. *See Defenders II*, 450 F.3d at 399, n.4 (Kozinski, J., dissenting). That interpretation threatens to disrupt other largely settled relationships with the Federal Government, such as, for example, the requirement that the U.S. Bureau of Reclamation comply with State water law. *See* Reclamation Act, ch. 1093, § 8, 30 Stat. 388, 390 (1902) (codified at 43 U.S.C. §§ 372, 383) and *California v. United States*, 438 U.S. 645, 665, 667, 98 S.Ct. 2985, 2996, 2997 (1978). *Compare Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109, 1158 (2003), *vacated as moot*, 355 F.3d 1215 (10th Cir. 2004) (Kelley, J., dissenting) (criticizing the majority for ignoring § 8 and transforming the ESA into a "Frankenstein" that, "despite the good intentions of its creators, has become a monster" by allowing "the federal government to overturn this established [Reclamation Act] precedent.").

Guardians v. Johanns, 450 F.3d 455 (9th Cir. 2006); *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir. 1987).

The duty to reinitiate consultation is tempered by language nearly identical to that appearing in 50 C.F.R. § 402.03, which the panel majority deemed "coterminous" with the language of ESA § 7(a)(2). *Defenders I*, 420 F.3d at 969. To the extent the majority's analysis of ESA § 7(a)(2) stands, it is virtually certain that EPA will voluntarily (or involuntarily) revisit decisions made long ago to transfer authority under CWA § 402(b). The States' investment in their NPDES programs could be lost entirely as a result of forced ESA compliance. A determination that the *Amici* States must forfeit their programs would run contrary to this Court's recognition of States' dominant role in regulating their waters. *See Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174, 121 S.Ct. 675, 684 (2001) (acknowledging "the States' traditional and primary power over land and water use").

CONCLUSION

For the reasons set forth herein, the judgment of the court of appeals should be reversed.

Respectfully submitted,

JON C. BRUNING
Nebraska Attorney General
DAVID D. COOKSON
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509

DONALD G. BLANKENAU
THOMAS R. WILMOTH
Special Assistant
Attorneys General
BLACKWELL SANDERS
PEPER MARTIN LLP
Suite 1400
206 South 13th Street
Lincoln, NE 68508